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No. 01-1269

In the
Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART;
CITY ENGINEER GERALD DZURILLA, AND
CLERK OF COUNCIL GREGG WAGNER,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION;
CUYAHOGA HOUSING PARTNERS, INC.;
BUCKEYE COMMUNITY THREE L.P.; AND
FAIR HOUSING CONTACT SERVICE, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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Questions Presented for Review

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may the court inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal corporation?

2. In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?

3. Does the Due Process Clause of the Constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

List of Parties to the Proceedings in the Court Below

Petitioners

The petitioners are the City of Cuyahoga Falls, its Mayor, Don L. Robart, its former City Engineer, Gerald Dzurilla, and its former Clerk of City Council, Gregg Wagner. Petitioners were the defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Since this case was filed in 1996, both Gerald Dzurilla and Gregg Wagner have left their positions with the City. The individual defendants remain in this litigation in their official capacities only.

Respondents

The respondents are Buckeye Community Hope Foundation, a not-for-profit corporation that seeks to construct housing projects utilizing low-income housing tax credits, Buckeye Community Three, L.P., a limited partnership that operates the housing project in question, Cuyahoga Housing Partners, Inc., a for-profit corporation acting as the general partner of Buckeye Community Three, L.P., and the Fair Housing Contact Service, a not-for-profit housing advocacy organization. Respondents were plaintiffs in the District Court and appellants/cross-appellees in the Court of Appeals. Petitioners are unaware of any publicly held companies owning 10% or more of the stock of any of the respondent entities.

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Opinions Below

The Sixth Circuit Court of Appeals opinion was issued June 15, 2001, and is reported at *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001). Appendix to the Petition for Writ of Certiorari "Pet. App.", at 1a. The unreported decision of the District Court, per Judge Dan Polster, granting summary judgment in favor of petitioners, was rendered on November 19, 1999, and is reproduced at Pet. App. at 35a. An earlier decision of the District Court, per Judge Sam Bell, denying summary judgment, is reported *sub nom* at 970 F.Supp. 1289 (N.D. Ohio 1997) and reproduced at Pet. App. at 55a.

Statement of Jurisdiction

The Sixth Circuit Court of Appeals entered its judgment on June 15, 2001, and denied a timely filed petition for rehearing *en banc* on December 4, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions, which, unless otherwise noted, are reproduced in the Appendix to the Petition for Writ of Certiorari at 258a, *et. seq.*:

A. The First Amendment to the United States Constitution.

B. Section 1 of the Fourteenth Amendment to the United States Constitution.

C. 42 U.S.C. 3604.

D. Article IX, Section 2, Cuyahoga Falls Charter.

E. Cuyahoga Falls Ordinance 1128.08. Jt. App. at 20.

F. Cuyahoga Falls Ordinances Chapter 1144. Jt. App. at 21.

Statement of the Case and Facts

Petitioner, City of Cuyahoga Falls, Ohio, is a charter municipality having a population just under 50,000. Joint Appendix "Jt. App.," p. 293. Respondent, Buckeye Community Hope Foundation is a not-for-profit corporation that facilitates the construction of apartment projects utilizing federal low-income housing tax credits. For each project, it creates a for-profit corporation—in this case, Cuyahoga Housing Partners, Inc.—which acts as a general partner of a limited partnership—in this case, Buckeye Community Three, L.P.—which actually owns and operates the project. Throughout this brief, these developer respondents shall be referred to collectively as "Buckeye."

In June, 1995, Buckeye purchased property in the City on which it planned to construct a 72-unit low-income apartment project. Appendix to the Petition for Writ of Certiorari "Pet. App.," p. 3a. The magnitude of the project was such that a site plan for the project had to be approved before building permits could be issued. Cuyahoga Falls Ordinance 1128.08. Jt. App., p. 20. In January, 1996, Buckeye submitted an application for site plan review to the Cuyahoga Falls Planning Commission. The project received a favorable recommendation from the City's Planning Director, Louis Sharpe, and the matter was submitted to the Planning Commission for a public hearing on February 21, 1996. Jt. App., p. 26.

The public hearing was attended by various citizens who expressed questions and concerns about the project. Jt. App., p. 35. After hearing all of the comments, the Planning Commission unanimously approved the project, subject to nine stipulations recommended by Mr. Sharpe that Buckeye found acceptable. Jt. App., p. 26; Paragraph 21 of Buckeye's First Amended and Supplemental Complaint filed in the District Court Record at Document No. 115. Several of the conditions had to be met before Buckeye could obtain building permits for its project. For example, Buckeye had to construct a fence along its property line and post various bonds and fees before obtaining building permits. Jt. App., pp. 26, 204.

The matter was then presented to City Council pursuant to the City Charter, which requires that all Planning Commission decisions be submitted to council. Article VIII, Section 1.7, Charter, Jt. App., p. 13. The site plan was referred to council's Planning and Zoning Committee, which held public meetings on March 4 and March 18, 1996. Jt. App., pp. 133, 171. As before, both meetings were attended by citizens who voiced their questions and opinions about the project. While some opposed the project, others expressed support for it. Despite any expressed opposition, City Council approved the project on April 1, 1996, in the form of Ordinance 48-1996. Jt. App., p. 17. Mayor Robart silently approved the ordinance by not exercising his veto power. Pet. App., 93a.

The ordinance was scheduled to take effect on May 2, 1996. Pet. App., 94a. However, before that date came, Buckeye prematurely made application to the City Engineer for building permits. Jt. App., p. 53. The engineer issued a permit for the required fence since

an effective site plan approval is not required to construct a fence. *Id.*, p. 54. However, he withheld the remainder of the requested permits as the ordinance approving the site plan had not yet taken effect and because there were defects in Buckeye's application for permits. *Id.*; Jt. App., pp. 93-94, 205.

On April 29, 1996, before the site plan ordinance could take effect, citizens filed a referendum petition with the Clerk of Council signed by some 4,300 electors seeking the popular review of Ordinance 48-1996. Jt. App., pp. 10, 89. The referendum was facially neutral and supported by justifications other than racial bias. Pet. App., pp. 18a-19a. The clerk forwarded the petition to the Summit County Board of Elections for verification of the signatures as required by Article IX, Section 2 of the charter. Jt. App., p. 10. The board promptly verified the signatures and returned the petition to the Clerk of Council for further proceedings pursuant to the charter. *Id.* City Council then voted once again on the ordinance and, as before, approved the ordinance. *Id.*, p. 11. This meant that the referendum would proceed to a vote at the next general election in November, 1996. Article IX, Section 2, Cuyahoga Falls Charter, Jt. App., p. 15.

The filing of the referendum petition prompted the City Engineer to seek legal advice from the Law Director as to the effect of the referendum on his ability to issue permits. Jt. App., p. 53. On April 30, 1996, the Law Director advised in a memorandum that the filing of the referendum prevented the site plan ordinance from taking effect. Jt. App., p. 55. Accordingly, he opined that building permits could not be issued until the efficacy of the ordinance was determined. *Id.* In

reliance upon this advice, the engineer continued to withhold building permits. Jt. App., p. 54.

On May 1, 1996, Buckeye filed an action in the Summit County Common Pleas Court seeking to enjoin the referendum process as unlawful under the Ohio Constitution. Trial was held and, on May 31, 1996, the court entered final judgment upholding the legality of the referendum and denying the request for injunctive relief. Pet. App., p. 255a. Buckeye pursued appeals to the Ohio Ninth District Court of Appeals and Ohio Supreme Court, which resulted in further orders upholding the City Charter and referendum as lawful. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). Pet. App., pp. 246a, 214a. Throughout this two year period, the City obeyed these orders and honored the referendum and its preemptive effect on the City's ability to issue building permits. Then, on July 16, 1998, the Ohio Supreme Court reconsidered its decision and reversed itself, holding that the City Charter could not reserve the right to review administrative acts by way of referendum. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539, (July 16, 1998). Pet. App., p. 194a. As before, the City obeyed this judgment and, once Buckeye complied with all of the conditions of the site plan approval, the City issued building permits. The project has since been constructed.

On July 5, 1996, after the Common Pleas Court entered judgment denying injunctive relief and while its appeal was pending in state court, Buckeye filed this lawsuit in the District Court again seeking to enjoin the referendum election and further seeking monetary damages. District Court Record, Document No. 1. Named defendants included the City, its engineer, its

council clerk, and Mayor Robart, who was sued in both his official and individual capacities. Buckeye claimed that, by withholding building permits, the City violated the Equal Protection and Due Process clauses of the Constitution and the Fair Housing Act, Title VIII of the Civil Rights Act. 42 U.S.C. 3604, *et. seq.* Buckeye's constitutional claims were presented by virtue of 42 U.S.C. 1983.

In October, 1996, the City defendants and Mayor Robart filed motions for summary judgment raising primarily affirmative defenses. The District Court, per Judge Sam Bell, dismissed the case as to Mayor Robart individually, but permitted the case against the City to continue. *Buckeye Comm. Hope Found. v. City of Cuyahoga Falls*, 970 F.Supp. 1289 (N.D. Ohio 1997). Pet. App., p. 55a. At about the same time, Buckeye filed a motion for preliminary injunction to enjoin the referendum process. A three day hearing was held in November, 1996,—actually *after* the referendum election—and the court overruled the motion for preliminary injunction. District Court Record, Document No. 78. The evidence adduced at the preliminary injunction hearing was relied upon by both parties in later summary judgment pleadings.

Discovery continued after which the court invited summary judgment motions on the merits of the case. District Court Record Document No. 105. As the motion pleadings were being filed, Judge Bell retired and was replaced by Judge Dan Polster, who granted the City's motion for summary judgment. Pet. App., p. 35a. The court found no evidence that the City Engineer, who withheld building permits, was motivated by an intent to discriminate. It further found that the City's actions, being required by state court judgments,

were reasonable under the Due Process Clause, and that, given the overriding interests in preserving the right of referendum, Buckeye could not establish a disparate impact claim under the Fair Housing Act. Buckeye appealed to the Sixth Circuit Court of Appeals, which reversed. Without overturning any of the District Court's factual findings, the court held that the City could be held liable for honoring the referendum petition even though it was facially neutral, supported by justifications other than illegal discrimination, and upheld by three Ohio courts. *Buckeye Comm. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001). Pet. App., p. 1a. The City timely filed a motion for rehearing *en banc*, which was overruled on December 4, 2001. Pet. App., p. 192a. This Court granted the City's petition for a writ of certiorari on June 24, 2002.

Summary of Argument

Buckeye seeks to hold the City financially liable because its engineer withheld building permits that were necessary for the construction of Buckeye's proposed housing project. Of course, the withholding of a building permit is not illegal in itself. Rather, liability depends on proof that the City's withholding of permits was unlawful for some other reason.

The City had many valid reasons for withholding building permits. First, the site plan approval, which was a prerequisite to the issuance of permits, did not take effect, being preempted by a facially neutral, judicially upheld, referendum petition. Second, the City was not able to lawfully issue building permits until Buckeye itself fulfilled the conditions of the site plan approval. In short, the City's withholding of permits was required by law.

Buckeye claims that the withholding of permits was unlawful because it:

1. was motivated by an intent to discriminate contrary to the Equal Protection Clause and Fair Housing Act,
2. had a disparate impact on protected classes contrary to the Fair Housing Act, and
3. was without a lawful basis contrary to the Due Process Clause.

Each of these claims must fail as a matter of law, as properly found by the District Court.

Buckeye's claim of intentional discrimination must fail as the evidence is undisputed that the City Engineer, who made the decision to withhold permits, was not motivated by an intent to discriminate; rather, he was motivated by the necessity to follow the law as that law was affirmed by the courts of Ohio. While not disputing this truth, the Court of Appeals erroneously found grounds for intentional discrimination in the statements of a handful of citizens who opposed the project. However, in the referendum context, the law does not permit courts to inquire into motives of a handful of citizens to find an improper motive it can then impute to government actors who did not share that motive. Such an analysis would invalidate the most legitimate of governmental actions and, in the process, seriously chill the exercise of first amendment rights by the citizenry.

Buckeye's disparate impact claim must fail as the Fair Housing Act does not permit such a cause of action in the context of a facially neutral and judicially upheld referendum petition.

Finally, Buckeye's due process claim is without merit as Buckeye cannot establish that it held a protected property interest in the issuance of building permits or that the City was without a rational reason to withhold them.

Argument

I. Introduction

The issue at the heart of this case is whether a municipal corporation can be held liable in damages because its citizens exercise their constitutional rights to assemble, speak, and petition the government by way of referendum. Such liability is incompatible with the United States Constitution and prior decisions of this Court.

This Court has repeatedly protected the right of citizens to pursue referenda, stating that such involves "core political speech," which is "guarded by the First Amendment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). This Court even upheld a California constitutional provision that *requires* a referendum vote on *all* low-income housing projects. *James v. Valtierra*, 402 U.S. 137 (1971). In doing so, the Court stated at pages 141 and 143 that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice" and that the referendum process gives the people "a voice in decisions that will affect the future development of their own community." The only difference between this case and *James* is that the instant referendum was not automatically required, but rather the result of a petitioning of the government. That distinction should not give rise to liability. On the contrary, a referendum arising out of popular petition should

receive greater protection, simply because of the manner of its inception. *Meyer v. Grant, supra; Eastlake v. Forest City Enterprises, Inc., supra.*

The decision of the court below strays from this Court's protection of fundamental rights, instead permitting liability for nothing more than the people's pursuit of the democratic process. Little else could be more un-American.

Like *James v. Va'[illegible]ra, supra*, this case deals with the referendum *process*, as opposed to the result of a specific vote. This is an important distinction. While courts may overturn the *result* of a referendum, they are loathe to invalidate the referendum *process* itself. Indeed, under Ohio law, which controlled the City's actions here, "It is well-settled that this court will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature." *Jurcisin v. Cuyahoga County Bd. of Elec.*, 35 Ohio St.3d 137, 146 (1988) quoting *State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5 (1983); *State ex rel. Bond v. Montgomery*, 63 Ohio App.3d 728 (1989).

The fact that the Ohio Supreme Court ultimately reversed itself and invalidated the instant referendum petition on state law grounds does nothing to minimize the federal constitutional rights to freely speak and petition the government. The civil rights laws should not be construed so as to punish citizens for pursuing these most fundamental of constitutional rights. *Thornhill v. Alabama*, 310 U.S. 88 (1940). Yet, that is exactly the result of the decision below.

II. Intentional Discrimination – Equal Protection Clause and Fair Housing Act

In the context of a referendum petition, a court may not inquire into the motives of the citizenry to find a basis for liability against a municipality for alleged intentional discrimination, but must limit its inquiry to the motives of the municipality's decision-maker

A. General Intentional Discrimination Law

Intentional discrimination by government officials is actionable under 42 U.S.C. 1983 as being violative of both the Equal Protection Clause and the Fair Housing Act, 42 U.S.C. 3604, *et seq. Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989). Municipal corporations can be held liable under 42 U.S.C. 1983 when their actions are made pursuant to an official policy. *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978). Only city officials with final policy-making authority may subject their city to 1983 liability for the consequences of their actions. *Matthews v. Columbia*, 294 F.3d 1294 (11th Cir. 2002). Furthermore, "in enacting [42 U.S.C] 1983, Congress did not intend to impose liability on a municipality unless deliberate action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." *Bd. of County Commrs. of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 400 (1997). In deciding a claim of intentional discrimination under *Arlington Heights*, courts are to focus, not on the political acts of the citizenry, but rather "on the general question of what motivated the government official to

take the challenged action." *Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997).

Applying this law, the analysis of this case should have been very straightforward. The challenged action in this case was the City's withholding of building permits. In Cuyahoga Falls, the decision to issue building permits rests with the City Engineer. Jt. App., p. 53. The City admits that the engineer temporarily withheld building permits. However, Buckeye must also admit—as the District Court found—that there was no evidence that he was motivated in any manner by an intent to discriminate. Pet. App. 48a. Without such evidence, the City was entitled to judgment as a matter of law and the District Court properly so held. Such should have been the end of the matter.

B. The Improper Analysis of the Court of Appeals

The Court of Appeals, however, erroneously went on to examine not the motives of the City Engineer, but the motivations of a select group of citizens who expressed opposition to Buckeye's project. This analysis is contrary to this Court's holding in *Arlington Heights*, *supra*.

The material facts of *Arlington Heights* are very similar to the instant case. There, a developer wished to construct a low-income housing project and was met with public opposition. Citizens attended a village board meeting and expressed their opinions, just as citizens did in Cuyahoga Falls. However, unlike the Cuyahoga Falls City Council, which *approved* Buckeye's project over citizens' objections, the village board in Arlington Heights *rejected* legislation that was necessary for the proposed project. The developer

sued, claiming violations of the Equal Protection Clause and Fair Housing Act.

This Court held that the developer was required to prove intentional discrimination on the part of the *village officials* who defeated the legislation. 429 U.S. at 268-269. After considering the evidence, this Court concluded that the developer had failed in its burden of proof. The Court noted at 269:

> In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence "does not warrant the conclusion that this motivated the defendants."

In other words, this Court focused its attention on the motivations of the *government decision-makers* and did not consider the arguably discriminatory comments of the citizenry. See also *Contreras v. City of Chicago*, *supra*, where the court upheld a summary judgment in the absence of evidence that the government decision-makers shared the racial animus of various vocal citizens who sought and supported the action taken by the government.

The court below failed to follow *Arlington Heights* and considered the motives of a handful of citizens, justifying its analysis on sentiments expressed in *United States v. City of Birmingham*, 727 F.2d 560 (6th Cir. 1984). This justification is in error. Not only is this case factually different from *Birmingham*, but the court below improperly read the holding of *Birmingham*. If the court had properly applied the law of *Birmingham*, it would have affirmed the grant of summary judgment.

In *Birmingham*, government officials voluntarily held a non-binding referendum in response to widespread and substantial public discriminatory sentiment. Even so, the District Court in that case stated in a holding affirmed by the Court of Appeals that "a finding of discriminatory intent may not be based solely upon the bigoted comments of a few citizens." *United States v. Birmingham*, 538 F.Supp 819 at 828 (E.D. Mich. 1982). Rather, Birmingham's liability was based on a finding that city officials had acted "for the *sole purpose* of appeasing racially motivated opponents of the proposal." *Id.*, at 827. [emphasis added] By acting solely to appease those who were racially motivated, Birmingham's decision-makers adopted those racial motivations as their own. The same was true in *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982), another case relied upon by the Court of Appeals.

Such simply is not the case here. No one has ever alleged that the City Engineer withheld permits "for the sole purpose" of appeasing racially motivated citizens. Furthermore, unlike *Birmingham*, all of the comments relied upon by the court below were made in a *failed* attempt to persuade the Planning Commission and City Council to reject Buckeye's site plan. Despite these comments, both bodies *approved* the site plan. It was most improper for the court below to rely upon *Birmingham* and *Clarkton* as a basis of liability when the officials in Cuyahoga Falls took the very actions those cases would have required of them.

Underlying the decisions in *Birmingham* and *Clarkton* is the presumption that the government officials had lawful discretion *not* to take the offensive action. By choosing to exercise their discretion for the sole purpose of appeasing discriminatory motives, the

officials of those cities were subject to liability. Here, the City had no lawful authority to do other than it did. As the referendum petition was valid as to form and contained a sufficient number of signatures, the City had no choice but to honor it. *State ex rel. Bond v. Montgomery, supra.* The petition's validity was further upheld by all three levels of Ohio state courts. Thus, the City had no alternative but to give effect to the referendum, which effect included the withholding of permits. Such is vastly different from the exercise of discretion to voluntarily give effect to discriminatory motives, as was the case in *Birmingham* and *Clarkton*.

C. Five Citizens Acting with Allegedly Improper Motivations do not a Referendum Make

There were other flaws in the Court of Appeals' analysis of this case. In finding as it did, the court focused on the comments of only a literal handful of residents. Pet. App., p. 25a. However, those comments did not represent the concerns or motivations of the whole of the City's citizenry or the whole of those who signed the referendum petition or even the whole of those who spoke at the public meetings.

The City has just under 50,000 citizens. Jt. App., p. 293. Over 4,300 of them signed the referendum petition. *Id.*, p. 89. Between the three public meetings, approximately 60 non-governmental residents spoke. See the minutes of meetings at Jt. App., pp. 35, 133, 171. Of those 60, the Court of Appeals identified five by name that it believed were motivated by underlying racial animus, and even then the court had to strain to find a racial component to the comments. Pet. App., p. 25a. The remainder either expressed non-racial concerns or merely asked questions about the project without

expressing an opinion for or against it. Assuming all those who spoke at the meetings also participated in the referendum—and that is by no means certain on this record, which is silent as to who actually signed the referendum petition—this means that those individuals who may have been motivated by racial considerations represented only one thousandth of the referendum petitioners and one ten-thousandth of the City's population.

By contrast, the others who spoke expressed their thoughts on such issues as the project's inconsistent density with the surrounding neighborhood, the impact of the project on the sewer, school system, traffic, storm water drainage, neighboring water wells, property values, and taxes as well as noise and light pollution. Pet. App., p. 47a-48a. These types of concerns are legitimate in the consideration of low-income housing. *Village of Arlington Heights v. Metro. Housing Corp.*, *supra*, at 258; *James v. Valtierra*, *supra*, at 142; *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986); *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995). Indeed, this evidence forced even the court below to conclude that "It is undisputed that the referendum in this case was facially neutral and that there were other hypothetical justifications for the referendum apart from racial bias." Pet. App., pp. 18a-19a.

Despite this dispositive factual finding, the Court of Appeals erroneously inquired into the motivations of the citizens, and then saddled the entire City with the sentiments of the few. However, a few improperly motivated citizens cannot, by themselves, make a referendum. In Cuyahoga Falls, it takes thousands of signatures to perfect a referendum petition. In this case, over 4,300 electors signed the petition. The few

people identified by the court below could effect nothing on their own.

By analogy, in *Scott-Harris v. City of Fall River*, 134 F.3d 427 (1st Cir. 1997), *rev'd on other grounds*, *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), six members of a nine member city council voted to eliminate the position of a city employee. Only two of the six member majority may have been improperly motivated. Because there were other potentially valid justifications for the council's actions, the court refused to impute the improper motives of the two to the remaining four council members. The claim of intentional discrimination against the city itself, therefore, failed.

Likewise, in *Mason v. Village of El Portal*, 240 F.3d 1337 (11th Cir. 2001), the court upheld the firing of a police chief by a 3-2 vote of the village council, finding at page 1339, "there can be no municipal liability unless all three members of the council who voted against reappointing Plaintiff shared the illegal motive."

The rationale for this rule of law was explained in the recent case of *Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002). In that case, the court upheld a county commission's decision to reduce a work force even though one of the three member majority of the commission was improperly motivated. The court explained at 294 F.3d 1298:

> In reaching this conclusion, we draw not only upon our precedent, but also upon our belief that a contrary rule would put lawmakers in an unacceptable position. Lawmakers' support for legislation can come from a variety of sources; one commissioner may support a particular piece of legislation for a blatantly unconstitu-

> tional reason, while another may support the same legislation for perfectly legitimate reasons. A well-intentioned lawmaker who votes for the legislation—even when he votes in the knowledge that others are voting for it for an unconstitutional reason and even when his unconstitutionally motivated colleague influences his vote—does not automatically ratify or endorse the unconstitutional motive. If we adopt the rule suggested by Plaintiff, the well-intentioned lawmaker in this hypothetical would be forced either to vote against his own view of what is best for his county or to subject his county to Section 1983 liability. We think the law compels no such outcome.

This same rationale applies to the popular political process. A person signing a referendum petition with a valid motivation should not be made to fear that others with unsavory motives are also signing the petition. In the instant case, as soon as citizens expressed opposition to the project in even remotely racial terms, all others—government officials and residents alike—were placed on the horns of a dilemma. Any action they took in opposition to the project, no matter how legitimately motivated, would be argued as having given effect to the improper motives of the few. The civil rights laws were never intended to silence the legitimate concerns of the many out of fear of association with the improper concerns of the few. For this reason, the Seventh Circuit held in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977) (*Arlington Heights II*), "the bigoted comments of a few

citizens, even those with power, should not invalidate action which in fact has a legitimate basis."

D. Courts May Not Inquire into the Motives of the Electorate to Find Racial Bias in an Otherwise Facially Neutral Referendum Petition

The Sixth Circuit previously held that courts may not inquire into the motivations of the electorate to find a basis of intentional discrimination. *Arthur v. City of Toledo*, 782 F. 2d 565 (6th Cir. 1986). *Arthur* is nearly identical to the instant case, but was nevertheless eschewed by the court below. In *Arthur*, the people of Toledo pursued a referendum to defeat an ordinance that would have provided sewer service to a low-income housing project. The developer sued raising the same claims raised here by Buckeye. The Court of Appeals, however, refused to consider the motivations of the citizenry, approving the holding of the District Court that, even though "'a few individuals made racial slurs in contacts and meetings leading to the Referendum of 1977, *** [a]bsent any facts to the contrary, the Court cannot infer racial bias to the total electorate.'" 782 F.2d at 574. *Arthur* recognized the impossible situation that would face any city considering a low-income housing project:

> If courts could always inquire into the motivations of voters even when the electorate has an otherwise valid reason for its decision, a municipality could never reject a low-income public housing project because proponents of the project could always introduce race as an issue in the referendum election. *Id.*

Arthur further warned, "Carried to its logical extreme, plaintiffs-appellants could establish a violation of the

equal protection clause if one voter testified that racial considerations motivated the voter's vote ***" 782 F.2d at 574. The court concluded that, "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a District Court cannot inquire into the electorate's motivations in an equal protection context." *Id.*

The court below erred by conducting the very inquiry *Arthur* prohibits. It inquired into the motives of the citizenry even while expressly finding that the referendum petition was facially neutral and supported by considerations other than race. In so holding, the court achieved *Arthur's* "logical extreme" by finding that an equal protection violation could be established if only one voter—or in this case, five residents out of 50,000—expressed racial bias.

The evidence in the record is undisputed. The City Engineer withheld building permits for reasons other than improper discrimination. He sought legal advice from the Law Director and continued to follow that advice for over two years while the courts of Ohio repeatedly affirmed it. The court's holding that the political expressions of five residents can be imputed to 4,300 petitioners and then used to find intentional discrimination on the part of an entire city is erroneous and can only lead to unworkable results. The ramifications of the court's holding are limited only by one's imagination. The decision of the Court of Appeals must be reversed.

III. Disparate Impact – Fair Housing Act

The impact of a facially neutral, judicially upheld referendum petition cannot form the basis of a disparate impact claim under the Fair Housing Act

A. Buckeye's Complaint Failed to Allege a Disparate Impact Cause of Action

One reason for rejecting Buckeye's disparate impact claim—argued below by the City but not accepted by either court—is that its complaint never raised such a claim in the first instance. Buckeye's fair housing claim is found in Count I of the First Amended and Supplemental Complaint at document 115 of the District Court record. Nothing in that count alleges that the referendum had a disparate impact on protected minorities. Rather, the fair housing allegations complain only of intentional discrimination. See *Id.*, at paragraphs 40 and 41. As Buckeye never put forth a disparate impact cause of action, the Court of Appeals erred in permitting it to pursue one. *Yee v. Escondido*, 503 U.S. 519 (1992).

B. The Legislative and Judicial History of the Fair Housing Act do not Support a Disparate Impact Cause of Action in this Case

To date, this Court has not recognized a disparate impact cause of action in the context of the Fair Housing Act, Title VIII of the 1968 Civil Rights Act. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988). The decisions of the circuit courts are not altogether consistent on the matter. See *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989) (requiring a finding of discriminatory intent); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (*Arlington Heights II*)

(recognizing a disparate impact cause of action "at least under some circumstances"). In a later case, the Seventh Circuit refused to extend the disparate impact approach to cases involving racial steering. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521(7th Cir. 1990).

More specific to the facts of this case, the effect of a facially neutral referendum petition cannot form the basis of a disparate impact claim under the Fair Housing Act. In *Arthur v. Toledo, supra*, the court stated at 782 F.2d at 575, "Given the strong policy considerations underlying referendums, we fear that *recognizing a cause of action* in such instances goes far beyond the intent of Congress and could lead courts into untenable results." [emphasis added] Given this Court's abiding respect for referendum rights, *Arthur's* refusal to recognize a disparate impact claim in such a case is understandable. *Meyer v. Grant, supra; Eastlake v. Forest City Enterprises, Inc., supra.*

It is also understandable in light of the plain language and legislative history of the Fair Housing Act. 42 U.S.C. 3604(a) makes it illegal to:

> refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin. states in relevant part. [emphasis added]

As early as 1901, this Court held that, in statutory construction, "the duty of the court 'is to take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, or would

lead to some other inconvenience or absurdity.'" *Treat v. White*, 181 U.S. 264, 267 (1901).

The key words in the statute are "because of." Webster's New World Dictionary, Second College Edition, defines "because" as "for the reason or cause that; on account of the fact that; since" or "the reason that." This language decidedly refers to cause and effect, an action taken "because of" one's status. Such causal language necessarily contemplates a deliberate act taken for an intentional purpose, *caused* by one's protected status under the statute. An otherwise legitimate act that merely has a disparate impact on protected classes cannot be said to have been taken "because of" the status of protected classes. The plain meaning of this language couldn't be clearer.

The City realizes that the above argument was rejected in *Arlington Heights II*. However, the City's position is further supported by legislative history not addressed in that case. During debate on the bill, a discussion occurred between Senators Magnuson and Mondale, who was a prime sponsor of the act. Senator Magnussen asked if the act would prohibit him from arranging privately to sell his home to another white Senator without making the home available on the open market. Such an act would clearly preclude the opportunity for others, including minorities, to purchase the home, thus having a discriminatory effect on minorities. Even so, Senator Mondale assured his colleague that such would not be illegal. 114 Cong. Rec. 4974. Senator Magnuson followed up with the following:

> Mr. Magnuson: The only prohibition is if I sought the Senator out to prevent someone else

from buying it and it discriminated against him. If that happened, that would be a violation of the law?

Mr. Mondale: Yes. The bill simply reaches the point where there is an offering to the public and the prospective seller refuses to sell to someone solely because of race.

Mr. Magnuson: And he would have to prove discrimination.

Mr. Mondale: Yes; and the burden is on the claimaint.

Id. The material difference in the two hypothetical situations posed by Senator Magnuson was that discriminatory intent was absent in the former, but present in the latter. Both, however, achieved the same effect, a sale of the home to an unprotected fellow Senator. Thus, Senators Mondale and Magnuson clearly understood the act to prohibit only intentional discrimination and not the mere impact of an otherwise legitimate act. Senator Mondale further stated at *Id.*, at 5643:

> The bill permits an owner to do everything that he could do anyhow with his property ***, except refuse to sell it to a person *solely* on the basis of his color or his religion. That is all it does. [emphasis added]

Clearly these comments by the bill's sponsor demonstrate at least his understanding of the meaning of the words "because of." From these remarks, it is inconceivable that Senator Mondale ever intended that, some thirty-four years later, a developer could use the Fair Housing Act to invalidate—and hold a

municipality civilly liable for—a facially neutral referendum petition. *Arthur, supra*, 782 F.2d at 575.

C. *The Facts of This Case do not Support a Disparate Impact Claim even under Those Cases that have Recognized Such a Claim*

Even those cases that have recognized a disparate impact cause of action under the Fair Housing Act have done so with severe limitations. For example, in *Arlington Heights II*, *supra*, the seminal case on the matter, the court found that a disparate impact claim could be found, but only "under *some* circumstances." 558 F.2d 1283. [emphasis added] Yet, those circumstances were not necessarily present in that case, even with the court finding that the municipal action had a disparate impact on minorities. The court remanded the matter for further factual determinations.

Likewise, in *Arthur v. Toledo*, *supra*, the court stated at 782 F.2d 577:

> not every denial, especially a temporary denial, of low-income public housing has a discriminatory impact on racial minorities sufficient to establish a prima facie violation of the Fair Housing Act. Accordingly, naked effect of an action by a government subdivision, without more, does not invoke the provisions of the Fair Housing Act. Otherwise municipalities would be forced to approve public housing projects regardless of cost, design, or the other considerations.

In *Arlington Heights II*, the court set forth a four prong test to determine whether a disparate impact claim could be sustained. The four prongs are:

1. The strength of the plaintiff's showing of discriminatory effect,
2. Whether there is some evidence of discriminatory intent,
3. The defendant's interest in taking the action complained of, and
4. Whether the plaintiff is seeking to compel housing or merely to restrain the defendants from interfering with housing.

Arthur recognized all but the second factor above, reasoning that a plaintiff should not receive "half credit" for failing to prove discriminatory intent. 782 F.2d at 575.

However, even applying the remaining three factors, the *Arthur* court refused to recognize a disparate impact claim in the referendum context. Focusing on the third prong of the *Arlington Heights II* test, the court recognized that the interest in upholding referendum rights far outweighs the statutory interests of a developer. *Id.* In fact, disparate impact liability in such a case will all but eliminate the exercise of first amendment rights in the context of low-income housing, producing the very "untenable results" *Arthur* sought to prevent.

IV. Rational Government Action – Substantive Due Process

The act of withholding of a building permit where the lawful prerequisites for its issuance have not been met, and where the withholding is required by the judgments of state courts does not constitute a due process violation

The Due Process Clause of the Fourteenth Amendment has two components, substantive and procedural due process. Both courts below recognized that Buckeye's complaint raised the issue of substantive due process. Pet. App., p. 26a, 33a, 41a.

A. General Substantive Due Process Law

The purpose of substantive due process is to prevent legitimate property rights from being deprived by government action that is arbitrary, capricious, and irrational. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). In a due process claim, the plaintiff must establish a constitutionally protected property interest in the thing denied and that the denial was arbitrary and without a rational basis in law. *Id.; Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997).

Without judicial restraint, it is easy to turn any injury to persons or property by a government official into a due process claim. As this Court cautioned in *Paul v. Davis*, 424 U.S. 693, 698-699 (1976), "It is hard to perceive any logical stopping place to such a line of reasoning." For this reason, the federal judiciary has been justifiably reluctant to extend due process protection to interests that are more properly protected in state courts construing state law. *Parratt v. Taylor*, 451 U.S. 526, 544 (1981); *Chiplin Enterprises v. City of*

Lebanon, 712 F.2d 1524 (1st Cir. 1983); *Contreras v. City of Chicago, supra*. A due process claim requires more than an allegation that "the government decision was arbitrary, capricious, or in violation of state law. *** Otherwise, every violation of state law could be turned into a federal constitutional tort." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992).

Here Buckeye claimed two violations of state law. First, it claimed that the referendum petition violated the Ohio Constitution. Second, it claimed that the City was required to issue building permits notwithstanding the preemptive effect of the referendum. While Buckeye presented these claims in state court, it chose a most time consuming judicial path, one that took over two years to wind its way through Ohio's three levels of courts.

Instead, Buckeye could have filed an original action in the Ohio Supreme Court, bypassing the two lower courts completely. Ohio law permits an original action in mandamus to raise elections challenges and to obtain building permits. See, *e.g.*, *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338 (1997); *Christy v. Summit Cty. Bd. of Elections*, 77 Ohio St.3d 35 (1996); *State ex rel The Killeen Realty Co. v. East Cleveland*, 169 Ohio St. 375. (1959). Thus, Buckeye could have sought a writ of mandamus, which would have provided Buckeye with a very efficient and expeditious remedy in the state's highest court, rather than the two year declaratory judgment process it chose to pursue. Accordingly, Buckeye is without a due process claim in federal court. *Contreras v. City of Chicago, supra*; *Chiplin Enterprises v. City of Lebanon, supra*; *Chesterfield Dev. Corp. v. Chesterfield, supra*.

B. Buckeye did not Hold a Constitutionally Protected Property Interest in Building Permits

Not all rights are protected by the due process clause. Due process protects only those rights that are "fundamental" and "implicit in the concept of ordered liberty." *Palko v Connecticut*, 302 U.S. 319, 325 (1937); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). Such fundamental rights do not include the right to receive building permits, even where state courts have ordered their issuance.

In *Chiplin Enterprises v. City of Lebanon, supra*, the City of Lebanon, New Hampshire, delayed issuing building permits for five years despite the developer's claim that he had complied with all requirements of the permit issuance. Ultimately, the New Hampshire state courts agreed and ordered the permits issued. Despite this, the federal court held that there was no due process property interest in the desired permits. Likewise, in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991) the court held at page 31, "This Court has repeatedly held, however, that rejection of development projects and refusals to issue building permits do not ordinarily implicate substantive due process."

While other cases have been slightly more friendly to developers, not even they help Buckeye's cause. For example, in *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995), the Sixth Circuit held that one can establish a property interest in a permit only if, under the permit approval process, the government agency is without any discretion to deny the permit. Even in *Triomphe*, however, it was not enough that the proposed use "conformed to all of the zoning requirements" or that the permit denial was found to be

arbitrary and capricious by a state court. *Id.*, 49 F.3d 200. Since the *process* granted discretion in considering the permit request—*even though there was no basis for the specific denial at issue*—the plaintiff in *Triomphe* did not have a legitimate entitlement to the requested permit. See also *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992), which reached the same result.

It cannot be seriously argued that the City was without discretion in considering Buckeye's site plan or its application for building permits. Rather, Cuyahoga Falls Ord. 1144.04, Jt. App., p. 22, lists a myriad of factors that the City may consider when reviewing a site plan, consideration of which necessarily requires the exercise of discretion.

As to building permits, the court below erroneously held that the City's approval of Buckeye's site plan gave it a constitutionally protected property interest in the desired permits. However, that holding ignored the totality of the site plan review process which, at the time under Ohio law, included potential popular review by way of referendum. Article IX, Section 2, Cuyahoga Falls Charter; *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). Until the referendum process was concluded, the site plan approval was not final and Buckeye could claim no right to building permits arising from it.

Further, in Cuyahoga Falls, a site plan approval is but one of many lawful prerequisites to the issuance of permits. Buckeye failed to fulfill other conditions, which failure *prevented* the City from issuing the requested permits. Cuyahoga Falls Ordinance 1144.03 prohibits the issuance of permits "except in accordance

with a plan of development*** " Jt. App., p. 21. In this case, the plan of development included several conditions that were "accepted by the Foundation." First Amended and Supplemental Complaint, District Court Document No. 115, paragraph 21. One of the conditions required Buckeye to construct a fence *before* obtaining building permits for the project. Jt. App., p. 25. It did not do so. Without building the fence, Buckeye could claim no entitlement to permits that depended upon the fence's prior construction.

Since the site plan approval did not take effect and since Buckeye did not fulfill the prerequisites to the issuance of building permits, it cannot claim a constitutionally protected property interest in either the site plan approval or building permits.

C. The City's withholding of Permits was not Arbitrary, Capricious or Without a Rational Basis.

A substantive due process violation also requires a finding of arbitrary conduct in the strict sense, that there is no rational basis for it. *Pearson v. Grand Blanc*, *supra*. Arbitrary conduct is that which is "'egregiously unacceptable, outrageous, or conscience-shocking.'" *Licasi v. Ferruzzil*, 22 F.3d 344, 347 (1st Cir. 1994), quoting *Amsden v. Moran*, 904 F.2d 748, 754 (1st. Cir. 1990).

Applying this standard, it would be the height of absurdity to conclude that the City acted arbitrarily. Chronologically, it first approved Buckeye's project; surely that was neither arbitrary nor capricious. When citizens filed a facially valid referendum petition, the City followed its charter and state law and submitted the same to the board of elections, first for verification of the signatures and later for placement on the ballot.

Article IX, Section 2, Cuyahoga Falls Charter; *State ex rel. Bond v. Montgomery, supra.* Surely nothing in that conduct shocks the conscience.

When Buckeye challenged the referendum judicially, and the courts upheld its validity, the City took the only action available to it and continued to honor the preemptive effect of the referendum on its ability to issue permits. This continued until the Ohio Supreme Court reversed itself. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539, (July 16, 1998). After that decision, and after Buckeye constructed the required fence—which took over a year after the final decision—the City issued the permits. In short, the City's actions were taken in reliance upon and obedience to the law. Such simply cannot be held to be arbitrary, capricious, irrational, or conscience-shocking.

As the withholding of building permits was required by a judicially upheld referendum petition and Buckeye's failure to comply with the conditions of site plan approval, there was neither a property interest in the desired permits, nor was the City's withholding of the permits arbitrary or without a rational basis. Furthermore, insofar as Buckeye felt it had a right to building permits, it had more than adequate remedies under state law. Therefore, its due process claim simply cannot be sustained under any reading of federal due process law. To the extent the Court of Appeals held otherwise, its decision is in error and must be reversed.

Conclusion

In the United States, the people have the right—and, indeed, are encouraged—to attend public meetings, to express their political views, and to petition their government. These jealously held rights, however, have little meaning if their exercise can form the basis of civil liability against an entire municipality.

The City's liability—if there can be any—will not be the result of the actions of its officials, all of which were required by law, but rather the result of *statements* made by citizens at public meetings. The City's liability will be based, not on its rightful obedience to court decisions, but because the people filed the petition in the first place. This Court simply cannot permit the exercise of First Amendment rights to result in civil liability.

For the foregoing reasons, the petitioners respectfully request that the judgment of the Court of Appeals be reversed and final judgment entered for the City of Cuyahoga Falls and its officials.

Respectfully submitted,

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